

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MICHAEL GULOTTA	:	
for Redetermination of a Deficiency or for Refund of	:	DETERMINATION
Personal Income Tax under Article 22 of the Tax	:	DTA NO. 819918
Law for the Year 1999.	:	

Petitioner, Michael Gulotta, P.O. Box 605, Unionville, New York 10988, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1999.

On August 5, 2004, the Division of Taxation, by its representative, Christopher C. O'Brien, Esq. (Kevin R. Law, Esq., of counsel), filed a motion for an order pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b) granting summary determination to the Division of Taxation on the ground that there exists no material issue of fact and imposing a separate penalty for the filing of a frivolous petition pursuant to Tax Law § 2018. The Division of Taxation submitted the affidavit of Kevin R. Law, Esq., sworn to August 4, 2004, and the affidavit of Sean O'Connor, sworn to August 4, 2004, with annexed exhibits, in support of its motion. Petitioner failed to file a response to the motion. His response was due on September 7, 2004, which date commenced the 90-day period for the issuance of this determination. Based upon the motion papers and all the pleadings and proceedings had herein, Gary R. Palmer, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether summary determination should be granted in favor of the Division of Taxation because there are no facts in dispute and, as a matter of law, the facts mandate a determination in favor of the Division.

II. Whether a frivolous petition penalty should be imposed pursuant to Tax Law § 2018 and 20 NYCRR 3000.21.

FINDINGS OF FACT

1. The affidavit of Sean O'Connor, a Tax Technician I in the Audit Division, sworn to August 4, 2004, was submitted by the Division of Taxation ("Division") in support of its motion in order to establish the facts upon which the Division based its notice of deficiency. Most of these facts are incorporated in the findings below.

2. In the ordinary course of business, during the year in issue, the Division maintained an electronic database known as the Wage Reporting System, which contained information submitted by employers pursuant to Tax Law § 171-a and 20 NYCRR 2380. The information included the employer identification number and the name, social security number and gross wages paid to each employee residing in New York State.

3. A review of the Wage Reporting System information for the year 1999, when cross-referenced with petitioner's social security number, revealed that The Promise Bible Book & Gift Shop, Inc. had paid petitioner wages of \$38,351.00 in 1999, from which New York State personal income tax in the sum of \$991.00 was withheld.

4. After a review of its records, the Division of Taxation determined that it had no record of petitioner's filing a personal income tax return with New York State for 1999. This point was admitted by petitioner in his petition.

5. On November 6, 2003, the Division issued a statement of proposed audit changes to petitioner, which informed him that the Division had no record of his having filed his 1999 New York State personal income tax return and, as a result, the Division had estimated his New York State income tax. Petitioner was further informed that the Division had credited him with income tax withheld based on information in its withholding tax records, and it invited petitioner to provide wage and tax statements if he had additional income tax withheld. The Division advised petitioner that it imposed failure to file penalty (Tax Law § 685[a][1]) and negligence penalty (Tax Law § 685[b][1],[2]) along with interest. Finally, petitioner was informed that the nature of the protest he interposed was considered to be frivolous under Federal and New York State tax law. A review of the statement of proposed audit changes indicates that petitioner was allowed the \$6,500.00 New York State standard deduction.

6. On January 2, 2004, the Division issued to petitioner a notice of deficiency based upon the statement of proposed audit changes. The notice set forth the following additional tax, penalties and interest due:

Period Ended	Tax	Interest	Penalty	Total
12-31-99	\$795.00	\$220.42	\$398.25	\$1,413.67

SUMMARY OF THE PARTIES' POSITIONS

7. Petitioner contends that the notice of deficiency is erroneous and that he did not file either a New York State or Federal return for 1999 because he did not receive gross income that exceeded the “threshold amount which would trigger a requirement to file said returns.” Petitioner also argues that the notice of deficiency is invalid because it is a “naked” assessment, unsupported by predicate evidence, and is not entitled to the presumption of correctness.

8. The Division of Taxation argues that petitioner had wage income during the year in issue which was subject to New York State personal income tax; that petitioner did not file a return or report receiving the wages for the year in issue and failed to pay all the income tax due on said income. Further, the Division urges this forum to impose the maximum penalty allowable for filing a frivolous petition.

CONCLUSIONS OF LAW

A. To obtain summary determination, the moving party must submit an affidavit, made by a person having knowledge of the facts, a copy of the pleadings and other available proof. The documents must show that there is no material issue of fact and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (*Glick & Dolleck, Inc. v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 94; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

In this matter, the Division submitted the affidavit of Sean O'Connor which established certain facts serving to demonstrate that wage income in the sum of \$38,351.00 was received by petitioner in 1999; that petitioner filed no New York State personal income tax return for that year; and that the full tax on his wage income was not paid. Petitioner has not filed answering papers in response to the Division's motion. Because the facts asserted by the Division in

support of its summary determination motion remain uncontroverted, they are deemed to have been admitted by petitioner (*Matter of Manny*, Tax Appeals Tribunal, August 7, 1997).

B. Petitioner's claim that the statutory notice issued by the Division is a naked assessment within the meaning of *United States v. Janis* (428 US 433, 49 L Ed 2d 1046, 1053) is not supported by the record. As stated in the affidavit of Sean O'Connor, the Division's source of the amount of petitioner's 1999 wages is a printout generated by the Division's Wage Reporting System. This printout included petitioner's name, his social security number, the employer's identification number of petitioner's employer, petitioner's gross wages for each quarter of 1999 and the total amount of tax withheld by the Division from those wages. The Wage Reporting System printout was submitted by the Division in support of its motion and is part of the record of this proceeding. By failing to respond to the Division's motion, the factual content of the printout has been deemed admitted by petitioner. Under the circumstances, the printout gives rise to a rational basis for the issuance of the notice of deficiency. It follows that the Division has presented sufficient evidence to establish that there is no triable issue of fact, and judgement may be entered in favor of the Division as a matter of law (*see, Matter of Klein*, Tax Appeals Tribunal, August 28, 2003). As noted above, the Division has established that petitioner failed to pay all the personal income tax due on wage income paid to him by The Promise Bible Book & Gift Shop, Inc., and failed to file a New York State personal income tax return for 1999.

C. Petitioner next asserts that his 1999 gross income did not exceed the threshold amount that would require him to file a New York State or a Federal income tax return. Tax Law § 651(a)(1)(A) requires that every resident individual who is required to file a Federal income tax return for the taxable year, must file a New York State return. Internal Revenue Code ("IRC") § 6012(a)(1)(A) requires that every individual having taxable year gross income that

equals or exceeds the exemption amount must file a (Federal) return, except that an unmarried person who is not a surviving spouse or head of household, or a person who is a head of household or a surviving spouse is not required to file a return if his gross income is less than the sum of the exemption amount plus the basic standard deduction applicable to such individual. For 1999 the exemption amount was \$2,000.00 (IRC § 151[d][1]) and the basic standard deduction ranged from a low of \$2,500.00 for a married individual filing a separate return, to a high of \$5,000.00 in the case of a joint return or a surviving spouse (IRC § 63[c][2]). Because petitioner's gross income has been determined to be at least \$38,351.00, he was required to file both a Federal and a New York State personal income tax return for tax year 1999.

D. The Division moves pursuant to Tax Law § 2018 and 20 NYCRR 3000.21 for a determination that petitioner either commenced the within proceeding primarily for delay, or that his positions in this matter are frivolous. While petitioner's assertions that his 1999 gross income did not exceed the threshold amount that would trigger a requirement to file a return, and that the notice of deficiency issued by the Division constitutes a naked assessment unsupported by predicate evidence, do not factually match any of the tax protestor-type arguments that are listed as examples of frivolous positions in 20 NYCRR 3000.21, petitioner's positions are no less devoid of merit and wasteful of the time and energy of the Division's counsel and audit staff and that of Division of Tax Appeals personnel. Petitioner acknowledged receiving the Division's statement of proposed audit changes in November of 2003, which statement informed petitioner that the Division was proposing to assess him for personal income tax he owed on a specified amount of unreported salary from The Promise Bible Book & Gift Shop, Inc. For petitioner to argue that the statutory notice issued in January 2004 was a naked assessment is clearly specious, as is his contention that he is not required to report these earnings.

E. Tax Law § 2018 authorizes the Tax Appeals Tribunal (and the Division of Tax Appeals) to impose a penalty “if any petitioner commences or maintains a proceeding in the Division of Tax Appeals primarily for delay, or if the petitioner’s position in such proceeding is frivolous.” A penalty may be imposed on the Tribunal’s own motion or on motion of the Office of Counsel of the Division of Taxation (20 NYCRR 3000.21). The maximum penalty allowable under this provision is \$500.00 (Tax Law § 2018). It is determined that petitioner’s positions, as stated in his petition, were commenced primarily for delay and are patently frivolous, and that, in accordance with Tax Law § 2018, a penalty in the sum of \$500.00 is imposed.

F. The Division's motion for summary determination in its favor is granted; the petition of Michael Gulotta is denied; the notice of deficiency, dated January 2, 2004, is sustained; and additional penalty of \$500.00 is imposed pursuant to Tax Law § 2018.

DATED: Troy, New York
December 2, 2004

/s/ Gary R. Palmer
ADMINISTRATIVE LAW JUDGE